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In The

Supreme Court of the United States

October Term, 1978

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

vs.

JOSEPH S. PORTASH,

Respondent.

BRIEF FOR RESPONDENT

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In The

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STATE OF NEW JERSEY,

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vs.

JOSEPH S. PORTASH,

Respondent.

BRIEF FOR RESPONDENT

JURISDICTION

The respondent, Joseph Portash, respectfully submits that the New Jersey Appellate Courts have properly interpreted the New Jersey State Public Employees Immunity Statute and therefore, adequate State grounds exist for the United States Supreme Court to refuse petitioner's request to exercise jurisdiction in this matter. In *Henry v. Mississippi*, 379 U.S. 443 (1965) Justice Brennan stated on behalf of the Court:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments

which rest on independent and adequate state grounds, even where these judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, *Murdock v. City of Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875), but also in cases involving state procedural grounds . . . but it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand. Under the view taken in *Murdock* of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law. Thus, the adequate non federal ground doctrine is necessary to avoid advisory opinions."

QUESTIONS PRESENTED

I. Respondent's conviction was a result of the trial court's ruling which denied the defendant protection of the Fifth Amendment and the State statutes — that conviction was properly reversed.

II. Immunized testimony given before a State Grand Jury pursuant to New Jersey Statutes Annotated 2A:81-17.2a2 cannot be used for impeachment purposes against the defendant in a subsequent criminal trial.

STATEMENT OF THE CASE

Joseph S. Portash, respondent herein, worked in New Jersey as an Assistant Ocean County Planner in 1960. Thereafter, he was appointed and later elected as a member of the Manchester Township Committee, the governing body of

that Ocean County municipality. Prior to this time, the concept of a senior citizens development had begun in neighboring communities. In 1964, as Mayor of Manchester, respondent promoted the concept of Senior Citizen Family Developments. Similarly, he developed a unique real estate analysis method used in selecting a site for the Ocean County College. In 1969, he began informal work for the Madison Agency, a real estate and insurance agency in Lakewood, Ocean County, New Jersey. A few months after that relationship began, respondent was appointed, and subsequently elected, to the Board of Freeholders, the county governing body, at which time respondent left his position as Ocean County Planner.

Eventually, in 1971, Joseph Portash became a formal employee of the Madison Agency and began receiving a salary. At that time, he received a promise of $5,000 for past services and $10,000 advance on future services. Work for the Madison Agency consisted of site analysis on the development of real estate projects in Ocean County, outside Manchester Township. Conferences were held with Donald Safran, the owner of the Madison Agency. During this period of time and while acting as Mayor of Manchester Township, as a member of the Municipal Utilities Authority (to which he was appointed in 1970) and as Freeholder Director, respondent voted on several items involving Leisure Technology Corp., which was doing business in Manchester Township. Many of these votes hindered projects begun by Leisure Technology and imposed costly requirements upon Leisure Technology which other municipalities had not required. See the testimony of Justin Segal (Vol. IX-T3-11). Many of the foregoing facts were not presented to the jury because the trial court's ruling precluded the defendant from taking the witness stand in his own behalf (see Point II, *infra*).

For a considerable amount of time prior to 1970, the Madison Agency had been servicing Leisure Technology with various forms of insurance coverage. Indeed, the Madison Agency received checks periodically from Leisure Technology

representing payment of premiums on such insurance and numerous loans which Robert Schmertz, President of Leisure Technology Corp. made to Donald Safran, President of the Madison Agency (Prisco's testimony, V-T170-172).

Prior to the creation of the Municipal Utilities Authority, Manchester Township had given water and sewer franchises to other senior citizen developments including Crestwood Village (water and sewer franchise) and Cedar Glen Lakes (water franchise). In order to induce Leisure Technology to develop in Manchester Township, the municipal body in early 1970 unanimously agreed to award Leisure Technology a franchise for sewer and water (see Kagan testimony, VII-T111-122). On July 1, 1971, respondent was formally hired by the Madison Agency to do site analysis and render consultation services as a Professional Planner. Had respondent not been denied his constitutional right to testify, he would have indicated that he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of employment. Indeed, during respondent's employment he never learned of the fact that Schmertz was an equal but silent partner in the Madison Agency. Portash's salary during that time period was a net of $241.20 per week, paid to him by check in the ordinary course of Madison's business (see Prisco testimony, V-T77-79).

During this same period of time, applications concerning Leisure Technology as well as other developers were considered by the Ocean County Planning Board. Several times respondent was absent during the voting on these matters (see Buckwald's testimony, XI-T29-33). There were instances wherein a vote was taken involving matters in which the respondent knew he had a conflict of interest. Some of these matters involved the First State Bank, a bank in which the respondent was a director. In all of these matters, the respondent abstained.

On September 23, 1971, the Madison Agency received a $15,000 check from Leisure Technology. Thereafter, $15,000

went from the Madison Agency to the Insurance Company of North America. The route of the check from Leisure Technology to the Madison Agency and subsequently to the Insurance Company of North America was explained in detail by the bookkeeper of the Madison Agency, Mrs. Prisco, who also explained generally the accounts and their activities (entire Vol. V of transcript). The tracing of the $15,000 check through the non-payroll account No. 103 is particularly stated at (V-T170-3 to 172-4) wherein the witness testified that the check came from Leisure Technology to the Madison Agency on September 23, 1971 and on the next day the check in the amount of $15,000 was made payable from the same account to the Insurance Company of North America, in payment for Leisure Technology insurance premiums. The Attorney General argued that the payment was for respondent notwithstanding the unrebutted proof that the $15,000 was paid to the Insurance Company of North America.

The instant case was tried for 16 days during which time numerous witnesses testified for the State and the defense. The jury thereafter deliberated approximately 17 hours over two days and for 12 consecutive hours on February 11, 1976, the date on which it reached its verdict. The jury found the defendant not guilty of misconduct in office, but guilty of wrongful taking.

The court, in ruling that the State could use the defendant's prior immunized testimony to impeach the respondent on the witness stand, placed him in a position where he was unable to testify in his own defense. Therefore, additional defense testimony was denied admission into evidence by the trial court's ruling that such testimony could not be linked up without the respondent's testimony. (See proffered testimony of Senator Hiering and John Sweeney, X-T19-43.)

Respondent specifically takes exception to the following points of petitioner's Statement of Facts:

Respondent is alleged by the petitioner to have been a self-appointed member of the Manchester Township Municipal Utilities Authority (PB3). Respondent was not self-appointed, but was appointed by the municipal governing body. Petitioner alleges that respondent had a "no show" job (PB4). In fact, this is not the case, respondent was employed and worked out of the office on various field projects for Madison Agency. Further, petitioner alleges that the employment was a conduit for illegal payments. This was not the case, and no evidence was placed in the record with regard to this allegation.

The allegations are a bald attempt to discredit the respondent as a dishonest person. Respondent acknowledged, in his immunized testimony, that certain of the documents evidencing his work and substantiating same were reproduced after the Grand Jury investigation (Appendix, p. 72). Respondent there stated that he reconstructed work records of jobs that were done previously thereto. Petitioner attempts to color the argument by inserting the word "fabricated", in place of reconstructed in order to brand the respondent (PB8).

The State attempts to present a rationale for granting immunity to the respondent by stating that his cooperation in the investigation of the Pineland's Environmental Council and Meridian Engineering was deemed more significant in its impact than in the instant case, *i.e., State v. Robert Schmertz and Leisure Technology*. This is pure conjecture and, in fact, no evidence was ever produced to indicate any significance whatsoever of respondent's testimony regarding the Pineland's Environmental Council.

The petitioner attempts to carve out from the grant of immunity respondent's statement of February 5, 1975, given upon request of the petitioner after its review of his Grand Jury testimony given some two months prior under the grant of immunity (PB9). The statement was conceded by the petitioner at trial to be given pursuant to the grant of immunity as it was evidence derived directly therefrom (Appendix, pp. 120A, 121A).

The statement of February 5, 1975 being derived directly from the prior immunized testimony is subject to the same constitutional and statutory mandate that it not be used against the defendant in any subsequent criminal proceeding as the immunized Grand Jury testimony itself. Notwithstanding their concessions, the petitioner now attempts to allege that the February 5th statement may be used against the defendant in the subsequent criminal proceeding.

At page PB11 the petitioner boldly indicates that it negotiated with respondent in attempting to obtain his removal from public office and in its investigation of him. Their offer either would permit respondent to make a lesser payment of restitution for salaries obtained, *i.e.*, some $15,000, if respondent would also give up his position as executive director of the Pineland's Environmental Council in New Jersey, or the State would stand on its original offer to accept $24, 322 along with respondent's resignation from his position as Mayor and cooperate with the State on other matters.

The petitioner then cavalierly states that the alternative proposal was offered in light of information received during preliminary discussions with respondent which would justify his resignation from the Pineland's Environmental Council, another position of public trust. The statements of respondent totally refute petitioner's allegations. These statements, which are in the record, address themselves only peripherally to any aspect of the Pineland's Environmental Council and nowhere indicate any information which would justify respondent's resignation. Petitioner's attempts to justify the negotiation of settlement monies for the removal of respondent from certain public offices were improper and demeaning to the State Attorney General's office and all law enforcement agencies in the State of New Jersey.

Petitioner attempts to convince this Court that it had in its possession certain information which justified the removal of a

public official from a position of public trust and that it decided not to press for the removal of said official if it could obtain more money from the public official by requiring a higher settlement payment, *i.e.*, $24,322 instead of $15,000. The petitioner's contention is preposterous and is a transparent attempt to justify its negotiations and actual haggling with the respondent over a money judgment and resignation from certain public positions in return for non-indictment in a criminal case. Petitioner embarked on a course of removing respondent from public office at any cost, and the attempted unconstitutional use of immunized testimony was the final step in the petitioner's design.

Petitioner indicates that the Deputy Attorney General spoke to the respondent on several occasions and contends that they were reluctant to do so (PB11). However, they reluctantly acceded to the extraordinary request of prior defense counsel in this instance and thereafter on one occasion spoke on the telephone directly with respondent for over an hour. In the conversation, respondent indicated that he was troubled about making the right decision, asserting that he had done nothing wrong and that to return the wages earned from his employment and to resign would be too much for him to bear. Other conversations took place between the respondent and the Deputy Attorney General assigned to the case. The respondent contends that he was advised by a Deputy Attorney General that he would have to alter his testimony in order to "get Schmertz" (XIII-T29).

Petitioner's conduct throughout the course of this proceeding is replete with coercion of the respondent; promises, proposals, negotiations, all of which had the central aim of removing the respondent from public office. When all of these methods employed by petitioner failed because respondent refused to step down from public office, petitioner obtained an indictment and conviction by improperly threatening the use of immunized testimony in the subsequent criminal proceeding.

The New Jersey Appellate Court determined that the attempted use of such testimony was in violation of the State Public Employees Immunity Statute and the Fifth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

I. Trial court erred in ruling that respondent's prior immunized Grand Jury testimony could be utilized to impeach him in a subsequent criminal procedure. This ruling was in violation of the Public Employees Immunity Statute and the Appellate Division of the New Jersey Superior Court properly reversed respondent's conviction. The Court's interpretation of the New Jersey statute was correct and the New Jersey Supreme Court refused to grant the State's petition for certification notwithstanding the State's argument that a waiver of defendant's rights had occurred. In fact, a ruling was sought at the trial court and given (XII-T60-20 to 61-20). New Jersey's Appellate and Supreme Court refused totally petitioner's erroneous argument that no ruling was given by the trial court. The case of *Brooks v. Tennessee*, 406 U.S. 605 (1972) and *Wardius v. Oregon*, 412 U.S. 470 (1973), support defendant's contention that he has not waived his Fifth Amendment privilege in the instant matter. In fact, had defendant taken the stand, he would have been deemed under existing law to have waived his privilege against self-incrimination. Petitioner's argument is totally specious and is unsupported by either New Jersey or United States Supreme Court authority. The "price" which the petitioner extracted from the respondent by threatening him with an unconstitutional use of his testimony was to prevent respondent from taking the stand. The coercive effect of extracting from respondent this unconstitutional "price" must not be permitted to succeed.

II. Respondent was compelled to surrender his Fifth Amendment privileges by the Public Employees Immunity Statute of the State of New Jersey which requires a public employee to testify at the Grand Jury or face forfeiture of his

position. After, respondent testified and after the petitioner took other statements from the respondent which were directly the result of his Grand Jury testimony, the defendant was indicted for misconduct in office and taking monies by a public employee. At trial, the petitioner threatened that if the defendant attempted to take the stand in his own defense, they would use the immunized Grand Jury testimony previously given to impeach his credibility if he was inconsistent in any manner. Defendant sought a court ruling that the New Jersey Public Employees statutory language which forbids the use in any subsequent criminal proceeding would bar the State from using the immunized testimony in the manner sought. The trial court ruled that the immunized testimony could be used to impeach defendant's credibility and the defendant, on the basis of the court's ruling, refused to testify.

The language of the statute is clear that no use can be made of the immunized testimony in a subsequent criminal proceeding except one for prosecution of perjury or false swearing which, of course, is not applicable here. As stated in *Kastigar v. United States,* 406 U.S. 441 (1972), in order to pass constitutional muster any use of the immunized testimony at a subsequent criminal proceeding is prohibited. The New Jersey Appellate Division relied on *Kastigar, supra,* and on the explicit language in the statute and reversed respondent's conviction on the basis that the trial court's ruling permitting the use of the testimony for impeachment purposes was improper as in violation of both the State statute and the United States Constitution's Fifth Amendment. The New Jersey Supreme Court dismissed the petitioner's subsequent appeal and they petitioned for a writ of certification. The New Jersey Court's interpretation of their statute was proper and is supported by numerous cases cited in respondent's Point II which held that an attempted use to impeach the credibility of a defendant through the use of immunized testimony is improper and unconstitutional. Petitioner's argument that a subsequent statement given by the respondent on February 5, 1975 is not subject to statutory immunity is specious in that it was directly derived from the

immunized Grand Jury testimony and under *Kastigar v. United States, supra,* is subject to the same prohibitions against use as the immunized testimony itself. In fact, this point was conceded at trial and was raised for the first time on appeal notwithstanding the concession by the petitioner at trial. Petitioner's reliance upon *Harris v. New York,* 401 U.S. 222 (1971) to allow the testimony is inappropriate as stated in *United States v. Hockenberry,* 474 F.2d 274 (3rd Cir. 1973); *United States v. Frumento,* 552 F.2d 534 (3rd Cir. 1977) and *United States v. Apfelbaum,* ____ F.2d ____ (3rd Cir. 1978). Respondent further urges that adequate State grounds exist because of the New Jersey Appellate Court's interpretation of their own statute which is a matter of domestic substantive law. Respondent urges that the Court should refuse to exercise jurisdiction on the basis of the adequate State grounds and deny petitioner's request for the Court to take jurisdiction. If the Court wishes to reach the question of the use of the immunized testimony, respondent urges that *Hockenberry, Frumento, Apfelbaum* as well as the Appellate Division of *State v. Portash,* are well reasoned, logical and compelling in their holdings that the use of the testimony in the manner urged by petitioner would unconstitutionally dilute respondent's Fifth Amendment constitutional privileges.

ARGUMENT

Point I

Respondent's conviction was a result of the trial court's ruling which denied the defendant protection of the Fifth Amendment and the State statutues. That conviction was properly reversed.

The petitioner's argument would have the Court believe that the trial court reached no decision regarding the use of the respondent's immunized testimony and that the respondent waived any constitutional protection by failing to take the stand. This argument is erroneous based upon the facts and the law

applied to those facts, the State law, and general federal concepts of waiver.

Notwithstanding the petitioner's assertion, the court below did in fact rule that the defendant's immunized testimony could be used against him in cross-examination in the following clear unequivocal language:

> "THE COURT: Well, this is what the Court was concerned with and still is and I thought the Court had straightened it out previously, the witness taking the stand and testifying as to something and then have counsel saying didn't you say before the grand jury such and such.
>
> MR. WILBERT: That's the problem that we have. We don't know whether he's going to be able to use that or not, your Honor, especially if he didn't touch that area in his examination.
>
> THE COURT: Mr. Wilbert, suppose your client takes the stand and he testifies that I worked for Donald Safran and suppose he testified before the grand jury I never worked for Donald Safran?
>
> MR. WILBERT: Inconsistency and under your Honor's ruling that can be used in this case.
>
> THE COURT: *No doubt about it.*
>
> MR. WILBERT: Your Honor, I would submit it could be used over my objection, of course.
>
> THE COURT: You have a standing objection with respect to the use at all of the grand jury testimony." (XII-T60-20 to 61-20). (Emphasis added.)

It is obvious from the language quoted that there is no question that the trial court did in fact rule under the New Jersey Public Employees Immunity Statute and consistent with the Fifth Amendment constitutional privileges that prior, immunized Grand Jury testimony could be used to impeach the respondent. Faced with the court's ruling the respondent properly invoked his Fifth Amendment privilege and his privileges under the New Jersey Public Employees Immunity Statute and refused to testify.

Petitioner argues that respondent waived his constitutional privilege by not testifying and the potential Fifth Amendment problem did not ripen into an acutal injury. This argument is fundamentally misconceived, because it ignores the fact that defendant paid a "price" to prevent the trial court from acting on its threat to violate his privilege against self-incrimination. We must assume for purposes of the petitioner's waiver argument that use of the defendant's testimony would have violated his privilege against self-incrimination. Accordingly, in the instant case, the petitioner used threats of unconstitutional conduct to obtain something from the respondent that it was not otherwise entitled to, *i.e.*, his decision not to testify as a witness in his defense. In order to prevent the State from committing a wrongful violation of his privilege against self-incrimination, the respondent was forced to give up something that he was otherwise entitled to, namely, his right to testify on his own behalf and thereby suffered constitutional injury.

This point can best be illustrated by example. Suppose that instead of threatening to use his testimony for purposes of impeachment, the petitioner had threatened to use the compelled testimony unless the defendant agreed to waive his right to counsel, or right to jury trial, or to pay the prosecutor $1,000 under the table. Surely, if the defendant did one of those things in order to forestall the prosecutor from violating his privilege against self-incrimination, he could demonstrate that he had been wrongfully compelled to pay a "price" to protect his privilege. Otherwise, if the waiver argument is accepted, it

dictates that the State can get away with threatening the defendant with unconstitutional conduct, so long as the threat is intimidating enough to be successful.

The United States Supreme Court in *Brooks v. Tennessee,* 406 U.S. 605 (1972) had occasion to consider whether the State could exact a "price" from defendant in return for allowing him to testify in his own defense. The Supreme Court in review of such matter declared that the defendant did not waive his constitutional right to be silent. The Tennessee State statute in *Brooks* required that if the defendant testify in his own defense, he testify as the first defense witness or not at all. The Supreme Court declared that statute to be unconstitutional and reasoned at page 610:

> "Section 40-2043 (the statute in the Brooks case) exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first. This, we think, casts a heavy burden on the defendant's otherwise unconditional right not to take the stand. The rule, in other words, 'cuts down on the privilege (to remain silent) by making its assertion costly'." *Griffin v. California,* 380 U.S. 609 (1965).

The "price" in the instant case is more onerous than *Brooks* because respondent gave up his absolute right to remain silent under compulsion of the New Jersey Public Employees Immunity Statute. Under the precise terms of the statute, respondent surrendered his Fifth Amendment right on the basis that the immunized testimony would not be used against him in any subsequent criminal proceeding. The trial court's ruling that the immunized testimony could be used to impeach his credibility, if he chose to take the stand and testify in his own defense, unconstitutionally infringed his Fifth Amendment privilege.

It is abundantly clear from a reading in *Brooks* that the defendant did not waive his constitutional rights. Such rationale should be applied in the instant matter to preserve the respondent's Fifth Amendment protection. Further support for respondent's protection is found in *Wardius v. Oregon,* 412 U.S. 470 (1973).

In *Wardius, supra,* Justice Marshall reviewed a due process argument of defendant regarding his requirement to provide an alibi defense in advance of trial when there was no reciprocal requirement on the part of the State to provide discovery. The State contended that defendant had waived his right to argue the constitutionality of the statute by not providing the alibi defense and, in fact, because the State had not introduced rebuttal testimony to disprove the alibi, the defendant suffered no injury. *Wardius, supra,* page 477. Justice Marshall, in response to the State's argument, opined at page 477:

> "At the time petitioner was forced to decide whether or not to reveal his alibi defense to the prosecution, he had to deal with the statute as written with no way of knowing how it might subsequently be interpreted. Nor could he retract the information once provided should it turn out later that the hoped-for reciprocal discovery rights were not granted."

Justice Marshall further stated at page 478:

> "The statute as written did not provide for reciprocal discovery, and Petitioner cannot be faulted for taking the legislature at its word."

In the instant case, of course, the respondent cannot be faulted for taking the Legislature of the State of New Jersey at its word when it stated, in compelling him to surrender his Fifth Amendment privilege, that no use would be made of his testimony in a subsequent criminal proceeding.

In his dissenting opinion in *Brooks, supra,* Chief Justice Berger, voting to uphold the Tennessee statute, stated at page 614:

> "Petitioner was clearly not subjected to the obvious compulsion of being held in contempt for his silence, as in *Malloy v. Hogan,* 378 U.S. 1 (1964), nor did the Tennessee procedure subject him to any other significant compulsion to testify other than the compulsion faced by every defendant who chooses not to take the stand — the knowledge that in the absence of his testimony the force of the State's evidence may lead the jury to convict. Cases such as *Spevack v. Klein,* 385 U.S. 511 (1967) and *Gardner v. Broderick,* 392 U.S. 273 (1968), involving loss of employment or disbarment are therefore clearly inapposite."

In the instant case, of course, the defendant was subjected to the sanctions of the Public Employee Immunity Statute when he chose not to testify at the Grand Jury and was required to waive his Fifth Amendment privilege under the terms of the statute. Chief Justice Berger continued at page 616,

> "The rule that the defendant waives the Fifth Amendment privilege as to any and all relevant matters when he decides to take the stand certainly inhibits the choices and options of counsel, yet this Court has never questioned such a rule and reaffirmed its validity only last Term. See *McGautha v. California,* 402 U.S. 183, 215 (1971).
>
> * * *
>
> This is not a case or an issue of great importance, except as it erodes the important

> policy of allowing diversity of method and procedure to the States to the end that they can experiment and innovate, and retreat if they find they have taken a wrong path. Long ago, Justice Brandeis spoke of the need to let 'a single courageous state' try what others have not tried or will not try."

New Jersey has decided, in unequivocal terms, that the respondent has not waived his privilege in the instant matter and that the procedure he invoked by seeking and obtaining the trial court's ruling as to the use, if any, that the State may make of the prior immunized testimony was the proper manner of asserting his privilege against self-incrimination. Furthermore, the New Jersey courts have interpreted their own State's statute to hold that immunized testimony may not be used to impeach the defendant in a subsequent criminal proceeding.

It cannot be argued that there was a waiver in this case under the general federal concepts. No case cited by the petitioner nor known to the respondent stands for the proposition that the defendant must take the stand in trial to evoke his Fifth Amendment privilege against self-incrimination. Indeed, the contrary rule prevails, that upon taking the stand to offer testimony, the defendant waives his privilege against self-incrimination. *Smith v. United States,* 337 U.S. 137 (1949); *Johnson v. United States,* 318 U.S. 189 (1943). A witness may refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977). The trial court was obligated to render a decision and properly did so to apprise the respondent of the full ramifications of his taking the stand. Indeed, the case law is clear. Had the defendant been willing to forego his rights to the Fifth Amendment privilege and taken the stand, the State would then be in the position to argue that the defendant waived his constitutional immunity from giving testimony against himself by offering himself as a witness. *Raffel v. United States,* 271 U.S. 494 (1926); *Johnson v. United States, supra.*

Under the State's argument, the respondent would be required to take the stand in order to invoke the protection given his immunized testimony under the Fifth Amendment, but would have waived the protection of the Fifth Amendment by taking the stand. Such is the cruel irony that the petitioner would impose upon the respondent.

In the petitioner's argument *Hobson's Choice* reaches its apogee. Respondent's right against self-incrimination entitles him to remain silent unless he chooses to speak in the exercise of his own will and to suffer no penalty for such silence. *Smith v. United States,* 337 U.S. 137 (1949). In the case at bar, respondent's counsel and the State consumed 150 pages of transcript in an attempt to invoke the Fifth Amendment privilege against incrimination and the protection of the immunity statute. No clearer fact can be demonstrated from a reading of the transcript. The respondent refused to take the stand for the very purpose of protecting his Fifth Amendment privilege. Refusing to testify is in itself an assertion of the Fifth Amendment guarantee. That right is never lost unless voluntarily and intelligently waived. *Smith v. United States, supra. See also, Emspak v. United States,* 349 U.S. 190 (1955).

The privilege against self-incrimination must be claimed and may be waived. The witness, however, after having claimed the privilege, cannot properly be held to have waived such privilege and consequent immunity on vague and uncertain evidence inasmuch as waiver of constitutional rights is not to be lightly inferred. In the case at bar, the State now urges that the respondent should be placed in a vague and uncertain atmosphere of not knowing the extent of his protection prior to taking the stand. Indeed, upon taking the stand, the respondent would have waived his right against self-incrimination without full knowledge of the extent of the waiver and the State would then be in a position to argue that the respondent had waived his Fifth Amendment privilege. *See Smith v. United States, supra; Garner v. United States,* 424 U.S. 648 (1976); *Lefkowitz v.*

Turley, 414 U.S. 70 (1973); *see also Garrity v. New Jersey,* 385 U.S. 493 (1967). The respondent followed the only course of conduct available to him in order to protect his Fifth Amendment constitutional privilege after being confronted with the trial court's ruling. The respondent did not waive his constitutional privilege but rather attempted to preserve it in the strongest and clearest terms.

Neither the federal law nor the State law supports the petitioner's contention that the respondent waived his constitutional rights. The State Appellate Division, in the instant matter, acted properly under the United States Constitution and New Jersey State law in reversing respondent's illegal conviction.

Point II

Immunized testimony given before a State Grand Jury, pursuant to New Jersey Statutes Annotated 2A:81-17.2a2 cannot be used for impeachment purposes against the defendant in a subsequent criminal trial.

New Jersey Public Fmployees Immunity Statute, N.J.S.A. 2A:81-17.2a2 provided:

> "If any public employee testifies before any Court, grand jury or the State Commission of Investigation, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury committed while so testifying."

The statute was amended after respondent testified before the Grand Jury and in its present form states:

> "If any public employee, *having claimed the privilege against self-incrimination,* testified before any court, grand jury or the State Commission of Investigation *after having been informed that his failure to appear and testify would subject him to removal from his office,* position or employment, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury or *false swearing* committed while so testifying."

Prior to his indictment on November 6, 1974, respondent appeared with counsel before a State Grand Jury investigating Robert Schmertz, Leisure Technology's President, and Madison Agency principal. Respondent's appearance before the Grand Jury was in response to a subpoena served upon him on October 29, 1974. Respondent expressed his intention of claiming his Fifth Amendment privilege against self-incrimination. Subpoenaed again for November 14, 1974, respondent was granted immunity in the following terms:

> "We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury. No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before."

Respondent was asked whether he understood the purport of this agreement.

> "Mr. Luciani: (Deputy Attorney at Grand Jury proceeding and co-counsel at subsequent trial) Mr. Portash, do you understand, have you discussed this matter with your attorney?
>
> Mr. Portash: I believe so.
>
> Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?
>
> Mr. Portash: To the best of my knowledge of legal matters, yes."

Respondent then testified before the Grand Jury.

Thereafter, the State, in order to further clarify and augment respondent's Grand Jury testimony, took another statement on February 5, 1975, based on information learned by the State as a result of respondent's prior immunized Grand Jury testimony. Thereafter, at a subsequent trial on the matter, the trial court ruled that the immunized testimony could be used to impeach the respondent if he took the stand in his own defense. Petitioner's action in attempting to use respondent's statements to impeach him deprived respondent of his constitutional protection under the Fifth Amendment. The New Jersey Appellate Division found that the statute in question and the Fifth Amendment prohibited such use by the State and reversed respondent's conviction. The New Jersey Supreme Court denied the State's petition for certification, and dismissed the State's appeal. The New Jersey Appellate Division and Supreme Court determinations were proper under their interpretation of the New Jersey statute and existing case law.

Kastigar v. United States, 406 U.S. 441 (1972) held that immunity from use and derivative use was coextensive with the scope of the Fifth Amendment constitutional privilege against

self-incrimination and was therefore constitutionally sufficient to compel testimony over claim of privilege. In discussing use immunity, Justice Powell speaking for the Court stated as follows:

> "Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. at 453 (emphasis in original).

The Supreme Court's pronouncement in *Kastigar, supra,* indicates that immunized testimony could not be used in any manner to impeach a witness' credibility on cross-examination.

In *United States v. Hockenberry,* 474 F. 2d 247 (3rd Cir. 1973) Judge Hastie discussed the effect of *Kastigar, supra,* on the possible use of immunized testimony in cross-examination. The trial court therein had admitted into evidence against the defendant at a perjury trial a truthful statement which the defendant had made to a Grand Jury on the same occasion as an alleged false statement unrelated to it. The defendant had testified under a grant of use immunity. After the defendant took the stand in his own defense and denied any knowledge of bribes or payoff, the prosecution attempted to discredit him on cross-examination by directing questions about his Grand Jury testimony. Over objection, the prosecution read excerpts from the Grand Jury testimony into the record. On appeal, the court held that the defendant's statements were definitely used against him since the statements were used to impeach his credibility as an accused person testifying in his own defense. In citing the *Kastigar, supra,* decision, the court rejected the prosecution's claim that an immunized statement could be used to discredit an individual as a witness in a subsequent prosecution if the

admission was truthful. The court stated that if immunity that deprives a defendant of the Fifth Amendment privilege is to be, as constitutionally it must, coextensive with the privilege itself, compelled admission of wrongdoing cannot later be used to discredit a defendant's effort to defend himself against a charge of some other wrongdoing. *Hockenberry, supra* at page 250.

Hockenberry holds that use immunity prohibits any use including an attempted impeachment of credibility on cross-examination and is squarely on point.

Further, in *Hockenberry, supra,* Judge Hastie specifically rejected the prosecution's reliance upon *Harris v. New York,* 401 U.S. 222 (1971). The court noted that the *Harris* case was involved with the *Miranda* procedural requirements as to right of counsel and had nothing to do with a matter involving immunity under a statute. Thus, the whole line of reasoning in *Harris* and cases subsequent to it cannot apply in regard to the attempted use of immunized testimony on cross-examination.

The trial court in the instant case (XII-T61-7 to 20) ruled that if respondent testified inconsistently with his Grand Jury testimony it would allow the Deputy Attorney General to cross-examine him using respondent's immunized Grand Jury testimony.

In *United States v. Frumento,* 552 F.2d 534 (3rd Cir. 1977) the United States Court of Appeals for the Third Circuit has occasion to again examine the question of whether immunized Grand Jury testimony could be used to impeach the credibility of defendant at a subsequent criminal proceeding. Therein Judge Garth, writing for the court *en banc,* addressed himself to the contention of defendant (Pisciotta) that he should not be required to testify under a grant of immunity before a trial court on the basis that if he were compelled to testify, the government might attempt to use his immunized testimony for the purpose of impeaching him should defendant testify in his own defense at a subsequent trial. The court therein stated at page 542:

"Here, no one claims that Pisciotta's responses could be used in the government's case in chief against him at a subsequent trial. Clearly, such use would contravene *Kastigar*, and would be exposed in a *Kastigar* hearing. At such a hearing, the burden upon the government to show that its evidence was derived from sources other than the immunized witness's testimony is a heavy one. *Kastigar v. United States*, supra 406 U.S. at 460, 461. (other cites omitted) Pisciotta's fear — a fear which is justified in part in light of the position taken by the government, (citing footnote 15 at bottom of page 542), is that the government could use his immunized testimony for the purpose of impeaching him should he testify in his own defense at a subsequent trial. However, if the government could use 'immunized' testimony in such a fashion, the point would be reached where a witness could, under *Kastigar*, have 'just cause' to refuse to answer. Clearly, if a witness had invoked his Fifth Amendment privilege, the government could have no testimony available with which it might impeach his subsequent sworn statements. Were we to permit impeachment with immunized testimony, we would then be affording the immunized witness something less than his full Fifth Amendment protection.

In *United States v. Hockenberry*, 474 F. 2d 247 (3d Cir. 1973), the government urged this Court to adopt a rule permitting the use of immunized testimony 'for the purpose of impeaching the immunized witness or an immunized defendant when . . . he chooses to testify on his own behalf.' Id. at 249 n.1. We responded that to argue . . . that the immunity statute allows the

use of any truthful admission of wrongdoing made in an immunized statement to discredit the individual as a witness in a subsequent prosecution, so narrows the statutory grant of immunity as to jeopardize its adequacy as a constitutional means of requiring self incrimination. But for the grant of immunity *Hockenberry* would have been privileged to refuse to admit to the grand jury his wrongdoing in the execution of affidavits to obtain search warrants. And if immunity that deprived him of that privilege is to be, as constitutionally it must, co-extensive with the privilege itself, his compelled admission of wrongdoing cannot later be used to discredit his effort to defend himself against a charge of some other wrongdoing. 'Immunity from the use of compelled testimony . . . prohibits the prosecutorial authorities from using the compelled testimony in *any* respect . . .'. Powell, J., in *Kastigar v. United States*, supra, 474 F. 2d at 249-50. We reiterate our adherence to this principle; except as the basis for a prosecution for perjury a witness's immunized testimony may not be used against him.

Finally, we note, as we did in *Hockenberry*, that *Harris v. New York*, 401 U.S. 222 (1971), does not bear upon this discussion. *Harris* held that statements inadmissible in the government's case in chief because of *Miranda* deficiencies could be used to impeach. *Harris* does not govern the use of statements obtained through a grant of immunity. Statements obtained under a grant of immunity are compelled-in essence, coerced. The compulsion, which under other circumstances would amount to a violation of Fifth Amendment rights, is permitted because of the

substitution of use and derivative use immunity. *Harris* offers no such safeguards, and is thus restricted to cases where coercion is not a factor. The *Harris* Court qualified its rule permitting impeachment as follows: 'Petitioner makes no claim that the statements made to the police were coerced or involuntary.' 401 U.S. at 224. We cannot conceive of any instance in which a witness given immunity could not claim that his testimony is both coerced and involuntary. The *Harris* rule, therefore, does not govern the use of such testimony. Pisciotta's dilemma, then, is illusory. His testimony could be used against him only in the event of a prosecution for perjury, but in no other way and for no other reason."

Finally, in the recent decision of *United States v. Apfelbaum*, ____F. 2d ____ (3rd Cir. August 10, 1978), the United States Circuit Court of Appeals for the Third Circuit once again addressed itself to the issue of the use of immunized testimony against the defendant in a subsequent criminal proceeding. The court therein interpreted a federal immunity statute, 18 U.S.C., Section 6002, a statute which is comparable to the New Jersey Immunity Statute at issue in this case. Judge Garth speaking for the court stated, that Grand Jury testimony which is compelled under a grant of immunity may be utilized only as the *corpus delicti of an indictment for perjury or for false swearing.*

Judge Garth said:

> "A grant of 'use and fruits' immunity conferred under 18 U.S.C. Section 6002 may indeed substitute for the Fifth Amendment privilege, but only because its protection against the subsequent use of the compelled testimony is *coextensive* with the scope of the privilege. *Kastigar v. United States,* 406 U.S. at 453. That

> is, the grant of the immunity must, by definition, afford the witness the same protection he would have received had he invoked the privilege. See *Kastigar v. United States,* 406 U.S. at 462; *United States v. Frumento,* 552 F. 2d 534, 542-43 (3d Cir. 1977) (en banc); *United States v. Kurzer,* 534 F. 2d 511, 516 (2d Cir. 1976). Because a witness who has properly invoked the privilege may remain silent, see *Kastigar v. United States,* 406 U.S. at 461, use and fruits immunity under section 6002 'prohibits the prosecutorial authorities from using the compelled testimony in *any* respect.' Id. at 453 . (Emphasis in original); accord, *United States v. Frumento,* 552 F. 2d at 543; *United States v. Hockenberry,* 474 F. 2d 247 (3d Cir. 1973). Put another way, invocation of the privilege would have left Apfelbaum in a position where he would not have answered questions, truthfully or falsely, and thus such answers could not have been used against him. In the words of the Constitution, he would not have been compelled to 'be a witness against himself.' "

In response to the petitioner's claim that there is no remedy for a witness' untruthful testimony, the court continued:

> "The sanction of the perjury statute adequately protects against a witness making a mockery of immunity. Our court has accordingly held that although a witness's false immunized testimony may indeed subject him to a prosecution for perjury, *United States v. Frumento,* 552 F. 2d at 543; *United States v. Hockenberry,* 474 F. 2d at 249, the use of the witness's immunized testimony is limited only to its use as the basis of a perjury indictment."

The court continued:

> "Other than as the *corpus delicti* of the indictment, the Government may not use immunized testimony as substantive evidence. *United States v. Frumento,* 552 F. 2d at 541-43; *United States v. Hockenberry,* 474 F. 2d at 249-50. As we have previously explained: 'no one could claim that the appellant's immunized responses could be used in the government's case in chief against him at a subsequent trial. Clearly such use would contravene *Kastigar.' United States v. Frumento,* 552 F. 2d at 542. Nor may immunized testimony be used to impeach the testimony of the witness. Id. at 542-43; *United States v. Hockenberry,* 474 F. 2d at 250.
>
> Clearly if a witness had invoked his Fifth Amendment privilege, the government could have no testimony available with which it might impeach his subsequent sworn statements. Were we to permit impeachment with immunized testimony, we would then be affording the immunized witness something less than his full Fifth Amendment protection." *United States v. Frumento,* 552 F. 2d at 543.

The court stated further:

> "Rather, *Frumento and Hockenberry* unequivocally prohibit any subsequent use of truthful immunized testimony against its speaker. We of course are bound by this precedent. Even were we not so bound, we would independently reach the same conclusion."

The reasoning in all of these cases is compelling. Were the defendant not compelled under a grant of immunity to testify,

there would, of course, be no statement in existence to impeach his credibility. To allow the State to utilize compelled testimony given under a grant of immunity to impeach the credibility of a defendant dilutes, in an unconstitutional manner, the defendant's Fifth Amendment protection.

The court concluded:

> "As to the Government's assertion that Apfelbaum's grand jury testimony was 'in all likelihood false', we acknowledge that if it is false it is unprotected, and therefore would subject Apfelbaum to the risk of a perjury or a false statement prosecution. However until such time as the immunized statements are incorporated into a false swearing indictment as the *corpus delicti* of the indictment, the statements are unavailable for use by the Government at trial. Permitting the Government unrestricted use of any immunized statements whenever it supposes them to be false would necessarily vitiate the protection afforded by a grant of immunity and would effectively abrogate the immunity agreement. As the Second Circuit Court of Appeals has observed, and as we here hold, the proper remedy in the situation where the Government believes that immunized statements are false is not to disregard the immunity grant but rather is to prosecute the perjurious witness. See *United States v. Kurzer,* 534 F.2d at 518. But cf. *United States v. Traumunti,* 500 F.2d 1334 (2d Cir.), *cert. denied,* 419 U.S. 1079 (1974)."

In the instant case there is no contention on the part of the petitioner that the statements of the respondent given under the grant of immunity are in any way false. In fact, it is conceded that they were truthful statements.

The court in *Apfelbaum* meticulously detailed the state of the law and also the proper remedy available to the State if they contend that the testimony at trial or given under the grant of immunity is false. That remedy is an indictment and prosecution for perjury or false swearing. The same remedy is afforded by the New Jersey statute in question and by the Appellate Division's decision in the instant case. *See also United States v. Kurzer,* 534 F.2d 511, 518 (2d Cir. 1976).

In *State of New Jersey v. Portash,* 151 N.J. Super. 200 (App. Div. 1977), *cert. denied,* 75 N.J. 597 (1978), *cert. granted,* ___ U.S. ___ (1978), the court stated at page 207:

> "the question is whether the State should be required to honor its promise, expressed in its statute and explicated in leading cases defining the required scope of immunity, not to use the testimony compelled in any subsequent criminal proceeding against the defendant, except in circumstances not here pertinent."

The court continued in the footnote at the bottom of page 207 of its opinion "i.e. in a charge for perjury or false swearing in giving the compelled testimony." The Appellate Division further, at page 204, quoted the statute which clearly indicates that no such public employee shall be exempt from prosecution or punishment for perjury or false swearing committed while so testifying.

It was conceded by respondent at trial and again at oral argument in the Appellate Division that in the event he were to testify at trial in an inconsistent manner with the Grand Jury testimony, the State would be afforded the remedy given under the statute. The court stated in its opinion at 207, that an indictment and prosecution for perjury could be brought against the defendant and the Grand Jury testimony could be introduced against the defendant at his trial for perjury. Petitioner's Argument at pages 30 and 31 of its brief misstates the court's opinion in its entirety.

New Jersey is in accord with the *Kastigar, Hockenberry, Frumento, Kurzer* and *Apfelbaum* decisions. *State v. Vinegra,* 134 N.J. Super. 432 (App. Div. 1975), *aff'd,* 73 N.J. 484 (1977) deals with the same statute under discussion in the case now presented before this Court. Judge Crane, speaking for the court, ruled that defendant's testimony before the Grand Jury may not be introduced in evidence against him in any subsequent criminal proceeding except as it might be relevant in a prosecution for perjury or false swearing (at page 439).

The court in *Vinegra, supra,* said: "Since defendant's Fifth Amendment protection is derived from the statute, we need not consider the effect of *Miranda v. Arizona.*" (citations omitted) 134 N.J. Super. at p. 439.

The Deputy Attorney General and the trial court relied heavily on *State v. Miller,* 67 N.J. 229 (1975) and *State v. Davis,* 67 N.J. 222 (1975).

In *Miller, supra,* the court specifically said that a statement which would be admissible on cross-examination under *Harris v. New York,* 401 U.S. 222 (1971) could only be admissible if the jury is clearly told that it may use this statement only in weighing the defendant's credibility and that it could not be used as substantive evidence. It further held that under New Jersey Evidence Rule 4, the court also has the right to exclude a *Harris, supra,* type statement entirely and bar its use even for the limited purpose of impeaching the defendant's credibility as a witness if it concludes that the probative value of the statement is substantially outweighed by the risk that its admission would create a substantial danger of undue prejudice or of misleading the jury. *See Miller, supra,* at p. 234.

State v. Davis, supra, held that the State could not use testimony which might be admissible to impeach a witness' credibility to rebut the testimony of alibi witnesses.

These two decisions turn on different principles than the case at bar. Both *State v. Miller, supra,* and *State v. Davis, supra,* rely on the reasoning of *Harris v. New York, supra,* which held that an arrested person's voluntary incriminating statement, though inadmissible as part of the prosecution's case in chief because the prisoner had not been advised of his right to counsel, may be used to impeach his credibility when he testifies as a witness in his own defense. In *Harris, supra,* the Court was deciding how broad a sanction is necessary to vindicate the *Miranda* procedural requirement that an arrested suspect must be advised of his right to counsel before he shall be interrogated. *United States v. Hockenberry, supra,* at p. 250.

The question at issue in the instant case is the scope of use immunity that government must afford in order to comply with the United States constitutional and New Jersey statutory protections against self-incrimination. The State has undertaken to grant a witness coextensive protection in order to justify compelling him to make an incriminating statement. The mandated *quid pro quo* is immunity coextensive with the privilege, to wit: immunity from any damaging use of the compelled truthful statement in a criminal prosecution. The *Harris* rule does not compel a person to incriminate himself. The abridgement of immunity in this case does. The court's ruling prevented the defendant from taking the witness stand for it subjected the respondent, in the event he took the stand, to an unconstitutional use of immunized testimony.

The State has never alleged that Mr. Portash did not tell the truth while testifying before the State Grand Jury. If it had, the State under the exception to N.J.S.A. 2A:81-17.2a2 could have tried him for perjury, or false swearing.

The State, through the Attorney General's office, made representations pursuant to the statute that the immunized testimony "Shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State . . ." N.J.S.A. 2A:81-17.2a2.

However, after making these representations, the State with the ruling of the trial court, now says that it can do what it promised not to do.

The Appellate Division's decision in this case held that the petitioner should not be permitted to impeach respondent's credibility at trial by use of testimony given under a grant of immunity pursuant to State statute. The State court's decision was proper. It is respectfully submitted there is no reason for the United State Supreme Court to review the New Jersey court's interpretation of this New Jersey statute. If the Court deems it advisable to review the New Jersey court's decision as not having been decided on adequate State grounds, the Supreme Court should uphold the decision below as being a proper interpretation of the Fifth Amendment requirements of the Public Employees Immunity Statute.

CONCLUSION

For all of the foregoing reasons, respondent urges this Court to affirm the judgment of the Superior Court of the New Jersey Appellate Division and the denial of the certification by the New Jersey Supreme Court which reversed the judgment of conviction and sentence.

Respectfully submitted,

s/ Michael E. Wilbert

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